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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1136

MURRAY TILLMAN, ROSALIND N. TILLMAN, HARRY C. PRESS, AND GRACE ROSNER,

Petitioners,

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., BERNARD KATZ, PHILIP S. TRUSSO, SIDNEY N. PLITMAN, ANTHONY J. DESIMONE, BRIAN CARROLL, ALBERT FRIEDLAND, MRS. ROBERT BENINGTON, MRS. ANTHONY ABATE, RICHARD E. McINTYRE, JAMES V. WELCH, MRS. ELLEN FENSTERMAKER, WALTER F. SMITH, JR., AND JAMES M. WHITTLES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

The Respondents, with the exception of Richard E. McIntyre, separately represented by counsel, respectfully

pray that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case, be denied.

QUESTION PRESENTED

Did the trial Court and the Appellate Court decide this case in ways conflicting with applicable decisions of your Honors?

STATEMENT OF THE CASE

The Statement of the Case, filed by Petitioners, is so incomplete, and lacking in essential points of detail, that the Respondents submit herewith the relevant facts, which have been substantially, if not totally undisputed. Their theory of the case may best be summed up by reference to *Smith v. Stinson*, 246 Md. 536:

> "To grossly exaggerate the wrongs, real or imaginary, inflicted by life, has been a preoccupation of mankind, as various writers have pointed out. One tends, said Gabriel Harvey, 'to make huge mountains of small molehills.' Phineas Fletcher mused that 'she takes me for a mountain that am but a molehill.' Said Richard Brome: 'Those people are forever swelling molehills to mountains,' and John Rhode (Cecil John Charles Street) noted in his book 'Dead in the Night', 1942, that 'life is a great one for turning molehills into mountains as the proverb has it.' The contentions of the Appellant singly and cumulatively, are made to sound like mountains of error; when examined closely they are but molehills and non-prejudicial molehills at that."

The facts, as herein stated, are set forth in the various pleadings, and the record of proceedings, before the District Court, as well as the Fourth Circuit Court of Appeals. This Honorable Court will not have the benefit of reading the transcript of proceedings, at the trial Court level, which contain all of the stipulated facts, since the Petitioners have refused to follow the mandatory requirements of the Fed-

eral Rules of Appellate Procedure, regarding inclusion of the typewritten transcript in the record. Their long series of procedural violations consists of a refusal to file a bond for costs on appeal, as required by Rule 7, failure to file and serve on the Respondents a statement of the issues to be presented on appeal, as required by Rules 10(b) and 30(b), failure to include in the appendix, on appeal, either the pleadings or judgment, as required by Rule 30(a), failure to serve on the Respondents a prior designation of the parts of the record to be included in the appendix, as required by Rule 30(b), improper references in the Brief and Reply Brief to evidentiary matter not set out in the appendix, in disregard of Rule 28(e), the late filing of a Reply Brief, in the Fourth Circuit Court of Appeals, without obtaining leave of Court, in violation of Rule 31(a), the late filing of a Petition for Rehearing, in violation of Rule 40(a), and failure to reimburse the Respondents for costs on appeal.

As to the undisputed facts, the Petitioners filed suit in the District Court for Maryland against Wheaton-Haven Recreation Association, Inc., and thirteen of its Directors, hereinafter called Wheaton-Haven, on the basis of several civil rights statutes, i.e., 42 U.S.C., Sections 1981, 1982, 1983, and 2000(a). Tillman, a member of Wheaton-Haven, complained that he is entitled to bring guests to the Wheaton-Haven pool, other than his relatives, although the uniformly applied By-laws limit guest privileges to relatives of members. Rosner claims that she has a contractual right to be a guest of Tillman. Press, who purchased his home in the Wheaton-Haven area, in 1967, with a no down payment G.I. loan, complained that he is entitled to a membership in the Wheaton-Haven pool. It is undisputed that the former owners of the Press home were not members of Wheaton-Haven, and no representation was ever made, at the time of the Press purchase, by anyone, that Mr. and

Mrs. Press were entitled to a membership, or would be afforded a membership, in Wheaton-Haven. There was no indication, at the time of their home purchase, that they even contemplated the purchase of a membership. Press did not seek to obtain an application, from the Board of Directors of Wheaton-Haven, by any formal request, but rather made an informal request to one of the Directors.

Following filing of the suit, the Petitioners' position under Section 1983 was emasculated by *Adickes v. Kress*, 398 U.S. 144, requiring State action as a prerequisite to recovery under this Statute, resulting in quiet abandonment of this portion of the case. At the hearing held before the Honorable Edward S. Northrop, on June 24, 1970, stipulations as to all material facts were made, and all parties agreed that the case should properly be decided on summary judgment. Although the Petitioners have not seen fit to present these stipulations to Your Honors, as contained in the Record, such record would reveal that counsel for the Petitioners conceded that 42 U.S.C., Section 2000(a) did not apply, with his main thrust, both in the District Court, and in the Fourth Circuit Court of Appeals, having been made under 42 U.S.C., Section 1982, and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229. Sullivan interpreted Section 1982 to prohibit a community recreation association from withholding, on the basis of race, approval of an assignment of a membership that was transferred incident to a lease of real property. The structure of the Little Hunting Park Pool Corporation, in *Sullivan*, tied home ownership to pool membership, allowed persons who owned more than one home to purchase more than one membership, and gave such persons the right to assign their membership, along with the disposition of the property. When Sullivan leased his home to Freeman, a Negro, at least a portion of the rent which he was paying included a pool

membership. Based on these facts, this Honorable Court, in a five to three decision, found such conduct a violation of Section 1982.

No such factual contentions, as were presented in *Sullivan*, appear in the instant case. The former owner of the home, purchased by Press, did not have a membership in Wheaton-Haven, and no promise of membership was made. No member has a right to assign a membership. If a member sells his home, he must forward a written resignation to the Association, which must purchase the membership back at Ninety Percent (90%) of the initiation fee, IF THE ASSOCIATION HAS A WAITING LIST. If there is no waiting list, which has been the situation with Wheaton-Haven, except for a very brief period, the Board of Directors, may AT ITS OPTION, repurchase the membership for Eighty Percent (80%) of the initiation fee. The selling member must forward a written resignation to the Association, and the purchaser of the home, who makes a formal written application for membership, within a reasonable period, shall have the first option to purchase the membership of the seller, subject to the approval of the Board of Directors. The first option of the home purchaser is not created until there has been a repurchase by Wheaton-Haven. Although the Petitioners attempt to create a right to a membership out of this pure expectancy, this provision of the Wheaton-Haven By-laws played no part in the development of this case, since Press makes no contention that he was denied the right to purchase the membership of a former member. He simply asks the Court to rule that he is entitled to purchase a membership. The applicable provision of the By-laws is as follows:

"*Article VI* — Resignation of Membership

A member in good standing who wishes to resign from the Association shall inform the Secretary in

writing of his decision. If the Association has a waiting list, the Board of Directors shall repurchase the merbership with funds provided by the resale of the membership by refunding not less than ninety per cent (90%) of the initiation fee in effect at the time of resignation, less any deficit assessments covering any periods of operation during which he was an active member, and annual dues or special assessments due the Association; provided, however, that if the resignation is to become effective before the swimming season opens, he shall not be liable for payment of annual dues for the next swimming season. If no waiting list exists, the Board of Directors may, at its option, repurchase the membership for eighty per cent (80%) of the initiation fee in effect at the time of the resignation, less amounts due the Association as outlined above. The procedure with respect to members who are dropped from the rolls by appropriate action of either the Board or the membership shall be the same as set forth herein for members who resign. In any case where a member sells his property, the purchaser thereof may have the first option to purchase the membership of the seller solely from the Association at a rate equal to the initiation fee in effect at the time of the sale; provided, however, that the seller forwards a written resignation to the Association, and the purchaser makes a formal written application for membership to the Board of Directors within a reasonable period. Such membership application shall be subject to the approval of the Board of Directors."

Both the trial Court and the Appellate Court found Wheaton-Haven to be distinctly private, that *Sullivan* did not apply to the facts in this case, and that neither the Civil Rights Acts of 1866 or 1964 were applicable. First roundly defeated in the trial Court, now smitten by the Appellate Court, the Petitioners undaunted, bring their molehill to the highest Court in the land.

ARGUMENT

THE DECISIONS OF THE LOWER COURTS STAND FOUR SQUARE WITH APPLICABLE STATUTES AND CASE LAW.

It is notable that this Honorable Court, in *Sullivan, supra,* did not find the Little Hunting Park pool to be a public accommodation under Section 2000(a). The Constitutional right of Wheaton-Haven to make membership selections on the basis of race, in its status as a private club, has been consistently recognized. *Evans v. Newton*, 382 U.S. 296; *Bell v. Maryland*, 378 U.S. 226; *Adickes v. Kress, supra.* The Respondents suggest that 1966 Kentucky Acts, Chapter 2, Section 402(a)(1) appears to set forth generally recognized guidelines:

> "A private club is not a place of public accommodation if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests."

Those cases and treatises which have attempted to meet the problem, have usually set forth the proposition that no one factor is controlling. Indeed, in finding that the Kenwood Club, in *Bell v. Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753, was a place of public accommodation, the Court stated "absence of self-government is not fatal to a claim that an organization is a private club." The suggested definition in 30 Montana Law Review 48, *"Public Accommodations,* What is a Private Club?", sets forth the generally accepted criteria:

1. Formed because of a common associational interest among the members.
2. Carefully screens applicants for membership and selects new members with reference to the common intimacy of association.

3. Limits the facilities or services of the organization strictly to members and their bona fide guests.

4. Control by the membership in general meetings.

5. Limits its membership to a number small enough to allow full membership participation and to insure that all members share the common associational bond.

6. Non-profit and operated solely for the benefit of the members.

7. Publicity, if any, is directed only to members for their information.

The stipulated facts, which have not been made available to Your Honors, indicate that Wheaton-Haven meets every single test set forth in this definition.

1. In 1958, a group of private citizens purchased a parcel of land, with their own funds, and formed a non-profit corporation. They were motivated by a common associational interest in building a swimming pool for their own use. "The purpose of the association shall be to own, construct, develop, operate, maintain and manage suitable facilities for the safe and healthful recreation of the association's members, said facilities to include a swimming pool, and such other facilities as the association may deem desirable" (By-laws, Article II).

2. Membership is *not* limited to home owners (Article III, By-laws), and, for all practical purposes, is not limited to any specific geographical area. At any regular meeting, a majority of the members, by an affirmative vote, may elect a person to membership, or, such membership may be obtained through the Board of Directors.

3. The facilities are limited to three hundred twenty-five family units, and relatives of members.

4. The corporation is controlled by its members, in that the By-laws (Article IX), require an annual meeting with at least twenty days notice to each member. The members may nominate Directors from the floor, and may bring business before the annual meeting, provided sufficient advance notice is given to the Board. Special meetings may be called, upon the request of twenty percent of the members. Ten percent of the family units, being a maximum of thirty-three members, constitutes a quorum. Amendment of the By-laws (Article XV) may be accomplished by the members, or the Board of Directors, subject to final approval of the members.

5. The Petitioners have never challenged the fact that Wheaton-Haven is non-profit and operated solely for the benefit of its members.

6. Wheaton-Haven engages in no publicity whatsoever. It maintains a sign, on its on premises, for the benefit of its members, giving the number where information may be obtained.

The Petitioners place great significance on the dicta, in the *Sullivan* case, wherein Your Honors said:

> "The Virginia trial Court rested on its conclusion that Little Hunting Park was a private social club. But we find nothing of the kind on this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographical area, there being no selective element other than race."

In spite of its finding that Little Hunting Park was not private, this Honorable Court did not find that the pool corporation was a public accommodation within the ambit of 42 U.S.C. Section 2000(a). Indeed, the stipulated facts, as to Wheaton-Haven, indicate that its activities place it squarely within the statutory exemption of Section 2000

(a)(e). The only remote classification within which the Wheaton-Haven pool could fall would be "a place of exhibition or entertainment", as contemplated by Section 2000(a)(b). Although it is not conceded that the Wheaton-Haven pool falls into this category, the additional requirement of Section 2000(a)(c) that "it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce" bars recovery under this Section. Further, the "State action" required by Section 2000(a)(d) applied in *Adickes v. Kress, supra,* is totally lacking, as was tacitly conceded by counsel for the Plaintiffs-Appellants, at the hearing before the District Court Judge and as would appear in the transcript, if contained in the record.

The Respondents, as well as Montgomery County, Maryland in its Amicus Curiae Brief, seem to imply that the required zoning under which the Wheaton-Haven swimming pool was constructed, known as a special exception, imports a continuing privilege granted by Montgomery County, Maryland. This special exception was granted by the Board of Appeals of Montgomery County, on September 23, 1958 following a public hearing, pursuant to Section 107 of the Montgomery County Code, 1965 edition as amended. It was granted under the precise Section of the Code as was the special exception granted to a nearby pool, in Montgomery County, known as North Chevy Chase Swimming Pool Association, Inc. The granting of the latter special exception was the subject of an appeal to the Court of Appeals of Maryland, on Constitutional grounds, in *Simpson, et al. v. County Board of Appeals,* 218 Md. 222, decided November 19, 1958, less than two months after the granting of the special exception to Wheaton-Haven. In that case, the Maryland Court of Appeals recognized the

privacy of community swimming pools, authorized by the Montgomery County Code, saying:

> "The association is a *private, non-profit, membership corporation,* which was incorporated for the purpose of constructing and operating a swimming pool and other related facilities."

The identical standards, required of the North Chevy Chase pool, were required of, and met by the Wheaton-Haven pool, in fitting the definition of community swimming pools, as presently set forth in Section 111-2 of the Montgomery County Code, 1965 edition as amended:

> *"Swimming Pool, Community.* A swimming pool or wading pool, including buildings necessary or incidental thereto, operated by members of more than ten families for the benefit of such group and not open to the general public, whether incorporated or unincorporated, whether organized as a club or cooperative or association; provided that it is not organized for profit and that the right to use such pool is restricted to such families and their guests."

The definition of community swimming pools is entirely compatible with the definition of private club, also set forth in Section 111-2, Montgomery County Code:

> *"Private Club.* An incorporated or unincorporated association for civic, social, cultural, religious, literary, political, recreational, or like activities, operated for the benefit of its members and not open to the general public."

The two uses are basically the same, as to organization, operation, member control, and lack of profit motive, but differ in that community swimming pools must meet stringent requirements, not required of a private club, for the protection of the general neighborhood (*Infra*).

An applicant for a community swimming pool must meet the requirements of Section 111-37 of the Montgomery County Code, 1965 edition, in that such applicant must prove, by a preponderance of the evidence, that such use will not affect adversely the present character or future development of the surrounding residential community, that certain specific set-backs are met, that a public water supply shall be available or that use of a private water supply will not affect adversely the water supply of the community, that certain screening requirements are met, that one parking space is provided for every seven persons lawfully permitted in the pool at one time (Section 111-27), and that special conditions may be added for the general welfare of the community, such as additional parking, additional fencing or screening, additional set-backs, location and arrangement of lighting, and a showing of financial responsibility. Once the requirements are met, a property owner has a prima facie right to enjoy a special exception. If there is no probative evidence of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious, and illegal. *Rockville Fuel and Feed v. Board of Appeals*, 257 Md. 183. Wheaton-Haven met its burden, resulting in the granting of the special exception without additional conditions, which was not appealed, and is presumed to be valid and correct. *Rockville Fuel and Feed v. Board of Appeals, supra.* The fact that Montgomery County requires a special exception to be obtained, before a community swimming pool may be constructed, is not controlling, since a special exception is likewise required for a public swimming pool, defined also in Section 111-2 of the Montgomery County Code, as follows:

> "*Swimming Pool, Commercial.* The swimming pool or wading pool, including buildings necessary or inci-

dental thereto, open to the general public and operated for profit."

Converesly, a special exception is not required for a small, private pool, defined as follows:

"*Swimming Pool, Private.* A swimming pool owned by members of not more than ten families and used by no one other than members of such families and their guests."

Indeed, then, the status of Wheaton-Haven, as to its public or private character, is determined by its structure and operation, rather than its label, as assigned by the local zoning ordinance. The Respondents submit that Wheaton-Haven has done everything, within its power, and within the framework of applicable laws and ordinances, to establish a genuinely private club, from the very day of its formation.

Montgomery County, Maryland lends great weight to the fact that an administrative body, on May 29, 1969, known as the Montgomery County Commission on Human Relations, found that Wheaton-Haven was a public accommodation. The proceedings conducted by this Commission were held under the authority of Ordinance 4-120, enacted in 1962, and codified as Chapter 77, Montgomery County Code, 1965. Montgomery County well knows that this Ordinance, which was enacted without legislative authority, was held to be unenforceable as a matter of law, by the Circuit Court for Montgomery County, Maryland, on September 12, 1969 (See Appendix A). This case, which was not appealed by Montgomery County, renders the proceedings before the Montgomery County Human Relations Commission a nullity. The Respondents submit that these were administrative proceedings, before laymen, and do not have the force of law, even had they not been declared void.

CONCLUSION

This case illustrates the "inevitable difficulties" surrounding the use of Section 1982, as was recognized by the dissent in the *Sullivan* case.

> "The majority's complete failure to articulate any standards for deciding what is property for Section 1982 is a fair indication of the great difficulties Courts will inevitably confront if Section 1982 is used to remedy racial discrimination in housing. And lurking in the background are grave Constitutional issues should Section 1982 be extended too far into some types of private discrimination. Not only does Section 1982 fail to provide standards as to the types of transactions in which discrimination is unlawful, but it also contains no provisions for enforcement, either public or private * * * The undiscriminating manner in which the Court has dealt with this case is both highlighted and compounded by the Court's failure to face, let alone resolve, two issues which lie buried beneath the surface of its opinion. Both issues are difficult ones, and the fact that the majority has not come to grips with them serves to illustrate the inevitable difficulties the Court will encounter if it continues to employ Section 1982 as a means for dealing with the many subtle problems that are bound to arise as the goal of eliminating discriminatory practices in our national life is pursued."

In bringing this appeal, the Petitioners refuse to recognize the polar propositions set forth in *Adickes v. Kress*, *supra*. They ask Your Honors, in effect, to rule that all swimming pools, even though purchased and constructed with private funds, even though member-controlled, even though non-profit, even though organized for the use of members and their guests, must, if constructed within a given community, whatever the definition of community may mean, open their doors to all members of the Negro race, while white persons may be denied membership, and

admission as guests, for any reason, however frivolous. Wheaton-Haven suggests unto Your Honors that such a conclusion would effectively eliminate the word private from the English language. It is entirely conceivable, and could ultimately follow from such an unfortunate decision, that a homeowner, owning a swimming pool, in his back-yard, with a white neighbor on one side, and a Negro on the other, could be required to accept the Negro as a guest in his pool, or respond in damages. Wheaton-Haven is known as a community swimming pool, only because a specific zoning category, under which it was constructed, is so labeled. A number of people, banding together in Montgomery County, Maryland, for the construction of a private swimming pool, *must* obtain such special exception, known as a community swimming pool, as a pre-requisite to construction. It must be conceded, by the Petitioners, that organizations exist which are distinctly private. This being the case, the Respondents thus query, "If Wheaton-Haven is not private, what more could have been done to meet the test of privacy?" The members may, by a majority vote, as authorized by the By-laws, voluntarily accept a Negro as a member, still maintaining their integrity and intimacy as a private club. The Petitioners now attempt to assert the right of Negroes to be guests, while conceding that white persons do not have such right, attempt to assert the right of Negroes to be members, while conceding that white persons do not have such right, and thus ask this Honorable Court to judicially terminate the existence of private associations.

In praying for a Writ of Certiorari, the Petitioners bring nothing of a startling nature, before this Honorable Court, and present nothing which would merit consideration, as outlined in Rule 19 of the Supreme Court Rules. There are obvious and substantial factual differences between the

Sullivan case, so heavily relied on by the Petitioners, and the instant case. There are literally thousands of small community pools, throughout the Country, with well over one hundred being in the Washington-Metropolitan Area, and with many and varied types of operation. Not satisfied with the determination of the District Court Judge, and the Fourth Circuit Court of Appeals, that Wheaton-Haven is distinctly private, with a Petition for rehearing having been considered and denied by a majority of the Appellate Bench, the Petitioners now ask Your Honors to analyze the structure of this one small isolated pool, to determine if it is in fact private. The Petitioners have been granted a full measure of justice, in spite of the fact that they have consistently defied the procedural rules, with impunity. It is respectfully prayed that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

HENRY J. NOYES,

Attorney for Respondents.

APPENDIX

In The
Circuit Court for Montgomery County, Maryland

No. 36124 Equity

Montgomery County, Maryland,

Plaintiff,

v.

Herman Elliott,

Defendant.

Opinion and Order

Montgomery County, the Plaintiff herein, prays for a mandatory injunction compelling the Defendant, a barber shop operator, to comply with the County Public Accommodation Ordinance, *Ordinance 4-120*, now a part of *Chapter 77, Montgomery County Code, 1965*.[1] The County claims

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[1] "*Article II. Discrimination in Places of Public Accommodation.*
Sec. 77-8. Statement of policy.
It is hereby declared to be the public policy of the county that discrimination in places of public accommodation against any person on account of race, color, religion, ancestry or national origin is contrary to the morals, ethics and purposes of a free, democratic society; is injurious to and threatens the peace and good government of this county; is injurious to and threatens the health, safety and welfare of persons within this county; and is illegal and should be abolished. It is further declared that this article is intended to apply and shall apply to all places of public accommodation in this county, whether or not such places are listed in section 77-9 of this Code, except as otherwise expressly provided. * * *
Sec. 77-9. Applicability of article.
This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall

that the Defendant violates the Ordinance by refusing to serve patrons on account of their race.

In accordance with the provisions of the Ordinance, the County's Human Relations Commission Panel on Public Accommodations has previously held a hearing and found that the Defendant committed unlawful discriminatory practices in the operation of his barber shop. It is alleged here that the Defendant has refused to comply with the Panel's order that he cease and desist from engaging in his discriminatory practices.

The Defendant demurs to the Bill of Complaint upon several grounds. In the view which the Court is obliged to take of this case, it shall be necessary to consider but one of those grounds. The Defendant contends that the Ordinance is void *ab initio* in that it is distinctly legislative in nature under the test enunciated by the Court of Appeals in *Scull v. Montgomery Citizens League*, 249 Md. 271, 239 A. 2d 92 (1968), but was enacted in executive rather than legislative session.

The thrust of the County's argument in opposition to the demurrer is that, under the *Scull* test, the Ordinance was

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apply and be applicable to every place of public accommodation, * * * whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public, either with or without charge, and shall include, but not be limited to, the following types of places, among others: * * * service establishments; * * *.

Sec. 77-10. Prohibited acts.

It shall be unlawful for any owner, lessee, operator, manager, agent or employee of any place of public accommodation, resort or amusement within the county:

(a) To make any distinction with respect to any person based on race, color, religion, ancestry or national origin in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

* * * * * *"

not legislation since it merely codified the common law innkeepers rule, and did not promulgate a "new plan or policy." Thus, the County contends, the subject matter of the Ordinance was amenable to executive action in an effort to "implement or administer" the otherwise prevailing common law rule.

In *Scull*, the Court of Appeals addressed itself to the problem created by the dual nature of the Montgomery County Council, which constitutes both the executive and legislative branches of the county government. Interpreting the Montgomery County Charter and the Express Powers Act, the Court distinguished between actions by the County Council which are essentially legislative and those which are essentially executive. Action by the County Council which prescribes a new plan or policy of general application is essentially legislative and may be validly enacted only while sitting in legislative session during the month of May (now from January 5 to February 3 of each year). On the other hand, action by the County Council which "merely looks to or facilitates the administration, execution or implementation of *a law already in force and effect*" is essentially executive and may be validly promulgated while sitting in executive session. 249 Md. at 282, 239 A. 2d at 98 (emphasis supplied). The Court concluded that distinctly legislative ordinances adopted by the County Council in executive session are "null and void." *Id.* at 284.

Since the same representative body, the County Council, sits as both the executive and the legislature, there may appear — at least superficially — to be little need to delineate the respective powers of each. Nonetheless, the Maryland "home rule" legislation and the Montgomery County Charter each contribute significant reasons why such a delineation is essential.

First, *Article XI-A* of the Constitution of Maryland, which is the backbone of "home rule" in this State, specifically requires that a county council may enact legislation only during a time period specified in the county charter, not to exceed forty-five days per year. As the Court noted in *Scull*, "Section 3 of Art. XI-A requires [that there be] a charter provision for 'an elective *legislative* body in which shall be vested *the* law-making power' of the County." Moreover, "[t]he Charter must [provide that]: '* * * *all* legislation shall be enacted *at the times so designated for that purpose* * * *.'" 249 Md. at 278, 239 A. 2d at 95-96 (emphasis in original). These constitutional restrictions were part of the political settlement under which "home rule" was first obtained in 1915. As the Court of Appeals stated in *Schneider v. Lansdale*, 191 Md. 317, 327, 61 A. 2d 671, 675 (1948) and adopted in *Scull*, 249 Md. at 275, 239 A. 2d at 94, "[t]hose who framed the amendment were fearful of a lawmaking body in continuous session and therefore the new authority to legislate was carefully restricted."

Second, the Montgomery County Charter complies with these Maryland constitutional requirements and in addition provides for popular referendum. As the Court noted in *Scull*, "Section 3 [of Article II of the Charter] 'General legislative powers,'" reads:

> "'The county council is the elective legislative body of the county and *is vested with the law-making power thereof* * * *.'" *Scull*, 249 Md. at 278, 239 A. 2d at 96 (emphasis supplied).

Similarly, as the Court there noted, "Article II, Sec. 1, makes *the Council 'in legislative session' the body in which is vested exclusively the law-making power of the County* * * *." 249 Md. at 281, 239 A. 2d at 97 (emphasis supplied). Consequently, although "the executive branch of county

government shall be composed of the county council in executive session" (Art. III, §1), Section 3 provides that "[t]he county council shall have power in executive session to: (a) Exercise all powers, *except powers to enact legislation* * * *." *Scull*, 249 Md. at 278-80, 239 A. 2d at 97 (emphasis supplied). Additionally, Article II, §6(a) of the Montgomery County Charter specifically provides that:

> "The people of Montgomery County reserve to themselves the power by petition to have submitted to the registered voters of the county for approval or rejection by them * * * any public local law * * *."

Since the County Council in legislative session is vested exclusively with the power to enact "public local laws," only ordinances enacted in legislative session are subject to the right to petition for referendum. Consequently, the promulgation of distinctly legislative ordinances while the Council is sitting in executive session not only violates the Maryland Constitutional delegation of authority to the County, but also deprives the people of a right to petition for referendum.

In delineating the scope of the Council's powers in executive and legislative session, the Court of Appeals adopted a "recognized test": An ordinance is subject only to legislative enactment, the Court said, if it "* * * is one making *a new law* — an enactment of general application prescribing a new plan or policy * * *." *Scull*, 249 Md. at 282, 239 A. 2d at 98. Conversely, an ordinance may be adopted in executive session only if it "* * * is one which merely looks to or facilitates the administration, execution or implementation of *a law* already in force and effect." *Id.* (emphasis supplied).

The case a bar does not pose any question regarding the substance or constitutionality of Public Accommodations

Ordinance 4-120. The primary question presented is the propriety of the mode of enactment of *Ordinance 4-120* as evaluated under the test announced in *Scull.* In particular, the issues raised are whether the common law innkeeper rule operates so as to proscribe racial discrimination by barbers and, if it does, whether the *Scull* test is satisfied by the County's "implementation" of a common law rule.

At common law, private businesses were generally allowed to refuse to deal with anyone for any reason. As early as 1460, however, the general rule was altered in the case of an innkeeper, so that "[i]f I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him * * *." *Anonymous,* Y.B. 39 H. VI 18.24 (1460) (Moile, J.); 3 Blackstone, Commentaries 166 (Lewis ed. 1902); Storey, *Commentaries on the Law of Bailments,* §§475, 590-91 (9th ed. 1878); see generally Tidswell, *The Innkeepers Legal Guide* (1864). The adoption of the English common law by the American States brought with it the common law innkeeper rule, so that it has been generally recognized that the rule applies in virtually all of the states. E.g., see, *Heart of the Atlanta Hotel, Inc. v. United States,* 379 U.S. 241, 261 (1964); *Civil Rights Cases,* 109 U.S. 3, 25 (1883) (Bradley, J.). In particular, the Maryland Court of Appeals has acknowledged the applicability of the common law innkeeper rule in Maryland. *Barnes v. State,* 236 Md. 564, 576-77, 204 A. 2d 787, 794 (1964); *Drews v. State,* 224 Md. 186, 191, 167 A. 2d 341, 343 (1961).

Most of the American cases discussing the common law innkeeper rule may be divided into two categories: those involving constitutional challenges to civil rights legislation, e.g., *Heart of Atlanta Motel, Inc. v. United States, supra; Barnes v. State, supra,* and those involving an attempted application of the innkeeper rule to a particular

type of "public accommodation", e.g., *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D. Md. 1960) (restaurant); *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E. 2d 697, 1 A.L.R. 2d 1160 (1947) (racetrack); *Drews v. State, supra* (amusement park); *Greenfield v. Maryland Jockey Club*, 190 Md. 96, 57 A. 2d 335 (1948) (racetrack); *Bowlin v. Lyon*, 25 N.W. 766, 67 Iowa 536 (1885) (skating rink). In the former group, the innkeeper rule found gratuitous approval in the context of showing that modern civil rights legislation has ancient roots.[2] In the latter group, the innkeeper rule formed the basis for relief but was rejected as inapplicable to the particular activity involved. Although none of these cases actually applied the common law innkeeper rule to prohibit racial discrimination by innkeepers, or anyone else, the opinions in each of the cases approve such an application in dicta.

Even though the rule may proscribe racial discrimination, it has not usually been interpreted as applying to all types of "public accommodations". (See cases cited above.) The policy underlying the innkeeper rule is one of public necessity. Inns were and are essential for public travel, and, in ancient England, as in some parts of the United States today, they were "few and far between". "The traveler would be at the mercy of the innkeeper, who might practice upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night." Wyman, *The Law of Public Callings as a Solution to the Trust Problem*, 17 Harv. L. Rev. 156, 159 (1903). Since the otherwise prevailing common law rule was that the proprietor

[2] In Justice Goldberg's concurring opinion in *Bell v. Maryland*, 378 U.S. 226, 299-300 (1964), the common law innkeeper rule formed part of the basis for arguing that the 14th Amendment was intended to place an affirmative duty upon the states to eliminate racial discrimination in public accommodations.

of a private business had absolute power to choose his customers, e.g., *Madden v. Queens County Jockey Club, supra*, courts have strictly interpreted the coverage of the innkeeper rule. The English courts have applied the rule to persons providing lodging to transient guests (innkeepers), common carriers, and blacksmiths. See discussion in *Jackson v. Rogers*, 2 Show. 237 (1683) (Jeffries, C.J.). American courts have been equally restrictive in defining the scope of the rule. The prevailing American rendition of the rule applies it to innkeepers and common carriers.[3] E.g., *Barnes v. State, supra*. Although there might be a question as to its application to barber shops, there is some support for the view that the common law rule applies to all types of public facilities licensed by law. See *Bell v. Maryland, supra;* but cf. *Drews v. State, supra*.

Regardless of the scope of the innkeeper rule, it is clear to this Court that the County Council sitting in its *legislative* capacity, does have the authority to enact a public accommodations law. This *legislative* authority is not diminished by the fact that the law so enacted merely "implements" or "codifies" a common law rule. The legislative branch has always had the power to modify or codify the common law. *Lutz v. State*, 167 Md. 12, 15, 172 A. 354, 356 (1934). The ordinance here in question, however, was passed in *executive* session.

Therefore, the central and dispositive issue in this case is whether the County Council may utilize its *executive* powers to "implement and administer" a common law rule. *Ordinance 4-120* must be evaluated in terms of the scope of the Council's executive powers as they are enumerated in

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[3] One can speculate that the rule ought to apply to service stations since they are the modern equivalent of blacksmiths, and they are most certainly heirs to the same degree of public necessity which brought blacksmiths under the rule.

Montgomery County Charter, Article III, Section 3, and interpreted by the Court of Appeals in *Scull*. It is upon this basis which we are compelled to find that the County Council, sitting in its *executive* capacity, has no power or authority to "implement or administer" a common law rule. Because of this conclusion, we need not now decide whether the common law innkeeper rule may be utilized to prevent racial discrimination in public accommodations and, if so, whether it applies to barber shops.

The County Council in executive session has no authority to "implement" common law rules because such implementation violates the rule announced in *Scull*. The Court said in *Scull* that the Council's executive power may be used to implement or administer "a law already in force and effect". The County here argues that "a law" includes the common law. The Court in *Scull* made it irrefutably clear that by "a law" it meant an ordinance *enacted* by the County Council in *legislative* session. As the Court stated:

> "* * * the Council in executive session * * * may implement and facilitate and insure the proper execution of *laws and ordinances passed by the Council in legislative sessions* * * * as the County Commissioners could have done in regard to public local laws passed by the General Assembly. *That the Council in executive session is to have no power to make law as such is made clear by and emphasized in various provisions of the Charter.*" *Scull*, 249 Md. at 281, 282, 239 A. 2d at 97-98 (emphasis supplied).

Moreover, in formulating the legislative-administrative test which it announced in *Scull*, the Court relied on and cited *Vanmeter v. City of Paris*, 273 S.W. 2d 49, 50 (Ky. 1954). See *Scull*, 249 Md. at 282-83, 239 A. 2d at 98. In *Vanmeter* the Court of Appeals of Kentucky stated:

> "* * * the rule is that the power to be exercised is legislative if it prescribes a new policy or plan, and is

> administrative if it merely pursues a plan *already adopted by the [municipal] legislative body or some power superior to it* [such as the state legislature]." 273 S.W. 2d at 50 (emphasis supplied).

In addition, the Supreme Court of California has had occasion to state that: "* * * if the action be designed merely to carry into effect *a law already enacted* it may be said to be administrative rather than legislative action." *Kleiber v. City and County of San Francisco*, 117 P. 2d 657, 659, 18 Cal. 718 (1941) (emphasis supplied).

Finally, the Court of Appeals said in *Scull* that "[i]f an ordinance brings into being a law as distinguished from ordaining an implementation or the administration or execution of *an existing law*, it must be passed at a *legislative* session of the council." 249 Md. at 284 (emphasis supplied).

From these statements of the rule it is inescapably clear that *Scull*, which is controlling here, limits the executive power of the County to the implementation of legislative enactments. Therefore, the Council may not utilize its executive power to implement a common law rule.

One of the foundations of our democratic institutions is the doctrine of separation of powers. In Maryland, this philosophical principle has been crystallized into a constitutional provision. Article 8 of the Declaration of Rights of the Constitution of Maryland provides:

> "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

The policy underlying this provision has been applied in situations involving executive encroachment upon judicial authority. In *Hoke v. Lawson*, 175 Md. 246, 257 (1938), the

Court of Appeals was faced with the question of whether an agreement by a police commissioner regarding the application of a Maryland Gambling law would prevent the court from enjoining certain gambling activities. The Court there noted that "there is in our system no such relation between the courts and the administrative officials as would render agreements by the latter effective to preclude the ordinary action of the courts in applying the law as they find it." Similarly, in *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860), the Supreme Court of the United States in interpreting Article IV, Section 2 of the United States Constitution (fugitive extradition clause), concluded that a governor could not demand that a sister state deliver a fugitive "unless the party was charged in the regular course of judicial proceedings". The Court based its decision upon its view that:

> "[A]ccording to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department." *Id.* at 104.

As these cases indicate, the judiciary has always had exclusive jurisdiction to interpret and apply the common law. Only *legislative* authority may be exercised so as to codify or modify a common law rule. As the Supreme Court noted in *Munn v. Illinois*, 94 U.S. 113, 134 (1875), "the common law * * * may be changed at the will, or even at the whim, of the *legislature* * * *, [i]ndeed, the great office of *statutes* is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances" (emphasis supplied). The Court of Appeals has

long adhered to the principal that the legislature may modify or codify the common law. See *Lutz v. State, supra.* However, unless the common law has been changed by legislative action, it is the duty of the *judiciary* to interpret and apply the common law in Maryland. *Damasiewicz v. Gorsuch*, 197 Md. 417, 439-40, 79 A. 2d 550, 560 (1951). Consequently, *Ordinance 4-120*, even if it merely codified a common law rule, was amenable to legislative process only and, as the product of the county's executive authority, is null and void.

In an effort to overcome the defects of *Ordinance 4-120*, the County makes several additional arguments: First, the County contends that any defect in *Ordinance 4-120* was cured through the enactment of Bill No. 1, Chapter 1 on May 10, 1966, by the County Council. Bill No. 1 provides:

> "Be it enacted by the County Council for Montgomery County, Maryland, that — Sec. 1. The Montgomery County Code 1965, published under the supervision of the County Attorney, be and the same is hereby legalized and made prima facie evidence of the following manners therein contained; a. All local laws * * *."

The County contends that by "legalize" the Council meant to adopt anew all local laws contained in the Code.

Although Bill No. 1, Chapter 1 might be viewed as a "legislative enactment", any fair interpretation of the County's Charter requires that the Council not be permitted to distort the prescribed legislative process. One of the effects of enactment of a "public local law" by legislative process is the right of the people to petition for referendum. Montgomery County Charter, Article II, §6(a). By enacting *Ordinance 4-120* in executive session, that right was avoided. Similarly, because of Bill No. 1's clear purpose (to cure minor publishing or enactment defects)

and its broad, equivocal language, it provides little or no effective notice to the populace that any new substantive plan or policy is being "authenticated". In short, Bill No. 1 does not serve sufficiently to apprise the voters of their right to petition for a referendum on the Public Accommodations Ordinance.

Moreover, a codifying act as broad as this one could not be interpreted as manifesting the Council's intent to re-enact *Ordinance 4-120*. Such overly broad "curative" enactments are ineffective to constitute re-enactment of specific legislation. See *Certain Lots Upon Which Taxes Are Delinquent v. Monticello*, 31 So. 2d 905, 159 Fla. 134 (1947). In fact, overly broad curative enactments have been treated as unconstitutional. E.g., *Town of Davie v. Hartline*, 199 So. 2d 280 (Fla. 1967); cf. E. McQuillin, 5 Municipal Corporations, Section 16.94 at 341 (3d ed. 1949). Similarly, in *Havre de Grace v. Bauer*, 152 Md. 521, 527, 137 A. 344, 346 (1927) the Court of Appeals held that a legislative adoption and approval of minutes which inaccurately recorded that a resolution had passed did not validate or legitimize the bill because there is no intent when voting on such "procedural" motions to approve substantive legislation. As these cases indicate, Bill No. 1, Chapter 1, did not constitute a legislative enactment of *Ordinance 4-120*.

Second, the County argues that the Supreme Court's interpretation of the Equal Protection Clause in *Hunter v. Erickson*, 37 U.S.L.W. 4091 (Jan. 20, 1969), requires that the County Council be permitted to enact civil rights ordinances while sitting in executive session. In *Hunter v. Erickson, supra*, the Court dealt with an amendment to the Akron City Charter which provided that local fair housing ordinances become effective only after their approval by a majority vote of the people. In other words, the amendment singled out housing regulations, "based on race" for

mandatory referendum, rather than the otherwise prevailing right of the people to petition for referendum. As the Court said, the Akron amendment constituted "an explicitly racial classification treating racial housing matters differently from other racial and housing matters". 37 U.S.L.W. at 4092.

The County's contention that in the case at bar, "* * * we have an analogous situation wherein the County Council can regulate places of business [etc.] * * * through * * * building regulations; etc. without the enactment of a local law * * *" is untenable. The flaw in the "analogy" is that neither the Montgomery County Charter, the Express Powers Act, nor the test enunciated in *Scull* attempt to single out "racial" topics for special procedures. The *Scull* distinction between implementation of existing laws and enactment of new policies applies equally to racial and non-racial topics.[4]

Third, the County contends that racial discrimination in public accommodations is a "badge of slavery" which is forbidden by the 13th Amendment. To be sure, racial discrimination is a "badge of slavery". *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445-46 (1968) (Douglas, J., concurring). And, racial discrimination in public accommo-

[4] One might argue, which the County does not, that the "old-new" distinction created by *Scull* tends to thwart the passage of local civil rights laws; since most civil rights legislation would be categorized as a "new policy," it requires a legislative enactment subject to referendum, whereas the remnants of "Jim Crowism" are "old" policies along with other matters not imbued with "racial" consequences and are thus amenable to executive action. Nonetheless, the problems with this argument are several: (A) It at least goes far beyond the holding of *Hunter v. Erickson* regarding special procedures for racial matters, and probably goes beyond any future application of *Hunter*. (B) it presents an inaccurate picture of the existing legislation. Jim Crow legislation has been largely eliminated and is subject to direct attack under the 14th Amendment, and several civil rights enactments have found their way into the category of "old or existing law".

dations in particular imposes such a badge.[5] However, the 13th Amendment has not been interpreted as a self-executing prohibition of all such "badges". In the *Jones* case, both the Court and Justice Douglas concurring agreed that the issue was whether Congress had the power to enact a "fair housing" law (42 U.S.C. §1982) which would proscribe purely private discrimination. See 392 U.S. at 439 (majority opinion); 392 U.S. at 444 (concurring opinion). In finding that the 1866 law *did* and *could* apply to purely private discrimination (*i.e.*, without relying on either the 14th Amendment or the interstate commerce clause), the Court relied upon the power of Congress under Section 2 of the 13th Amendment "to enforce this article by appropriate legislation."

The *Jones* case stands for the power of Congress under Section 2 of the 13th Amendment, not for the self-executing coverage of Section 1 of the 13th Amendment. No court has ever held that the 13th Amendment by itself proscribes all "badges of slavery". See E. S. Corwin, *The Constitution of the United States of America*, 1063-65 (1964 ed.). For these reasons, the County's 13th Amendment argument is also inapposite.

Fourth, the County argues that the right to be free of racial discrimination by private businesses serving the public is one of the enforceable rights recognized by the privileges and immunities clause. Unfortunately, the privileges and immunities clause was rendered a "practical nullity" by the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 71, 77-79 (1873). See E. S. Corwin, *The Constitution of the United States of America*, 1076 (1964 ed.). In *Twining v.*

[5] The Court in *Jones* indicated that the old view of the *Civil Righs Cases*, 109 U.S. 1, 24 (1883) that racial discrimination in public accommodations was *not* a badge of slavery may no longer command a majority. See *Jones*, 392 U.S. at 441 n. 78.

New Jersey, 211 U.S. 78, 97 (1908), the Court enumerated the rights which it considered among the "privileges and immunities" of United States Citizenship. Freedom from private discrimination was not among them. Moreover, although the Court has applied the privileges and immunities clause to ensure freedom of interstate travel, *Edwards v. California*, 314 U.S. 160 (1941), and to cut down state welfare residency requirements, *Shapiro v. Thompson*, 37 U.S.L.W. 4333 (April 21, 1969), the Court has never held that the privileges and immunities clause alone proscribes private discrimination in public accommodations. This is not to say that Congress does not have the power to "reach" public accommodations via Section 5 of the 14th Amendment, but that is not at issue here.

For all these reasons, we find that Montgomery County Ordinance 4-120 was enacted by the County Council in violation of its authority under the Charter, and as such is unenforceable as a matter of law.

As we said earlier, our disposition of the case makes it unnecessary to reach the other arguments raised by the Defendant in his demurrer, viz., that the Ordinance does not apply to barber shops, that the State has pre-empted the field, and that the Ordinance violates the Defendant's 13th Amendment right to be free of involuntary servitude.

It Is Thereupon, this 12th day of September, 1969, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the Demurrer filed by the Defendant in the above-captioned matter be, and the same is hereby SUSTAINED.

IRVING A. LEVINE,

Judge of the Circuit Court for
Montgomery County, Maryland.